84-1330

No.

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IN THE

Supreme Court of the United States

October Term, 1984

HARRIET M. GOULD,
Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK
Respondent,

v.

ROBERT L. ISRAEL, et. ux. and
C. WILLIAM BAILEY, et. ux.
Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Whether a federal court can proceed to adjudicate a removed civil action, not involving any federal question, against non-diverse and diverse citizen co-defendants while a state trial court order dismissing the non-diverse citizen co-defendants is suspended by virtue of a timely appeal to the State Court of Appeals, which said appeal ultimately reversed the trial court dismissal of the non-diverse defendants, and confirmed the lack of complete diversity between plaintiff and all defendants.

(2) Whether a federal court may refuse to follow state court substantive law in violation of 28 U.S.C. 1652 and *Erie Ry.* v. *Tompkins*, 304 U.S. 64 (1938), in these respects:

(a) By refusing to follow the rules of decisions of the highest state court that rejection of insurance benefits based on the suicide exception is unlawful when the insurer does not have evidence to prove suicide to a certainty.

(b) By following a state highest court opinion that has been withdrawn and declared to have no precedential value.

(c) By refusing to use the state Federal Court Local Law Certificate statute to obtain an authoritative statement of local law that is thought to be unclear.

(3) Whether the doctrine of estoppel by judgment precludes a federal court from relitigating the identical local law issue between the same parties that has been resolved by a final state appellate court judgment.

II. PARTIES

Harriet M. Gould, plaintiff, a Washington citizen; Mutual Life Insurance Company of New York (herein referred to as MONY, its public relations acronym), a New York corporation, co-defendant; the marital community of Robert L. Israel and wife, co-defendants, Washington citizens: the marital community of C. William Bailey and wife, co-defendants, Washington citizens.

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Defendants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Harriet M. Gould respectfully prays for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in this case.

I. OPINIONS BELOW

The opinion of the Court of Appeals (App. A1-A5) is reported at 735 F.2d 1165 (1984). The opinions of the District Court of March 1, 1983 and April 29, 1983 (App. B-1 to B-6) are not reported.

II. JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit is dated June 25, 1984. A petition for rehearing was timely filed on July 9, 1984. On September 27, 1984, the

petition for rehearing was denied. On December 14, 1984, the Honorable William H. Rehnquist granted an extension of time for filing this Petition to February 21, 1985. The jurisdiction of this court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

III. STATUTES AND REGULATIONS

1. 28 U.S.C. 1332. Diversity of citizenship.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs, and is between —

(1) Citizens of different states; . . .

2. 28 U.S.C. 1441. Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

3. **28 U.S.C. 1652. State Laws as rules of decision.**

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

4. **Washington Consumer Protection Act (WCPA) RCW Ch. 19.86:**

RCW 19.86.020: Unfair competition, practices, declared unlawful.

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.090: Civil action for damages, treble damages authorized.

Any person who is injured in his business or property by a violation of RCW 19.86.020, . . ., may bring a civil action in the superior court to . . . recover the actual damages sustained by him, or both, together with the costs of the suit, including a reasonable attorney's fee, and the court may in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained: Provided, that such increased damage award for violation of RCW 19.86.020 may not exceed ten thousand dollars: . . .

5. **Washington Insurance Code, RCW 48.010.030.**

Public Interest: The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon insurer, the insured and their representatives rests the duty of preserving inviolate the integrity of insurance.

6. Washington Federal Court Local Law Certificate Procedure Act, RCW Ch. 2.60: 2.60.020. Federal court certification of local law question.

When in the opinion of any federal court before whom a proceeding is pending, it is necesary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

7. Chapter 2.06 of Revised Code of Washington creating Court of Appeals.

RCW 2.06.010 and .030 - See Appendix D.

IV. CONCISE STATEMENT OF THE CASE

Petitioner brought this tort action (*Gould II*) in the state court under the Washington Consumers Protection Act (WCPA) seeking damages from MONY and its attorneys, Israel and Bailey, for the rejection, without reasonable justification, of her claim for the $25,000.00 benefits on a MONY policy on her husband's life. That rejection had forced petitioner to have to file suit to recover the policy proceeds (*Gould I*).

Petitioner's husband had been murdered by a bullet to the middle of the back of his skull — a typical execution-type slaying, in a public park. There was no suicide note. There were no known witnesses. All evidence as to manner of death was circumstantial. All facts and circumstances were consistent with homicide. MONY nevertheless rejected petitioner's claim, asserting the policy suicide exception.

Petitioner sued MONY for the policy benefits in the state court and obtained a judgment. MONY appealed the judgment solely in an effort to persuade the state Supreme Court to reverse a long line of decisions holding that an insurer must have evidence to prove suicide to a certainty before lawfully invoking the suicide

exception — that it is not enough to say the evidence is debatable. The state Supreme Court refused to overrule its prior decisions.[1] MONY unsuccessfully petitioned for reconsideration. These maneuvers delayed the widow's recovery for over five years.

Israel and Bailey not only acted as MONY's attorneys, but also made the decision to deny petitioner's claim without reasonable justification, as well as initiating and approving conduct designed to intimidate and harass petitioner in an effort to persuade her to abandon her claim or settle for a mere fraction of the policy benefits. MONY paid Israel and Bailey over $46,000.00. Petitioner's attorney was required to devote in excess of 1,000 hours to protect the widow's rights. MONY and its attorneys assert that their actions were motivated as a matter of "principle."

Following *Gould I*, petitioner instituted this action in state court. The state trial court dismissed the marital communities of Israel and wife and Bailey and wife on the grounds that attorneys have immunity for their WCPA torts and that a widow insurance beneficiary has no standing to sue under WCPA. Petitioner appealed that order of dismissal the same day it was entered.

MONY then removed to the federal District Court alleging that it was now the only defendant and that there was diversity between MONY and petitioner. Petitioner moved for remand or stay pending the resolution of the appeal from the state court order dismissing Israel and Bailey. The District Court ignored the local law that the appeal to the state appellate court suspended the order dismissing Israel and Bailey, and refused to remand or stay the proceedings, although it was clear that federal jurisdiction was — at the least — uncertain.

The District Court then granted MONY a summary judgment dismissal on the ground that to enforce WCPA would have a chilling effect on insurers defending suits on rejected claims. (App. B). Petitioner appealed to the Ninth Circuit.

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[1] *Gould* v. *MONY*, 99 Wn.2d 722, 629 P.2d 1331 (1981) [*Gould I*]

While the appeal in the Ninth Circuit was pending, the State Court of Appeals handed down its judgment reversing the trial court dismissal of Israel and Bailey (App. C), reinstating them as proper defendants, as well as rejecting both the theory that attorneys have immunity and that a widow beneficiary has no standing to sue under WCPA.

The judgment of the state Court of Appeals (App. C) became final under state law when respondents did not petition the state Supreme Court for review. RCW 2.06.030 (App. D).

The state appellate court decision was promptly furnished to the Ninth Circuit. Sixty-three days later the Ninth Circuit affirmed the District Court grant of summary judgment against petitioner, ignoring the fact that the identical local law issue had been resolved in a final state appellate court judgment, and in so doing held that MONY did not need the proof of suicide to a certainty as required by local law. This Petition for Certiorari follows.

V. FEDERAL JURISDICTION

Petitioner contends under the first question that federal courts never had jurisdiction in the first place, which became perfectly clear when the final judgment of the state court of appeals reversed the dismissal of the non-diverse party defendants. However, since the Ninth Circuirt refused to recognize the lack of diversity, even when pointed out in unmistakable language, this Court has the jurisdiction to reverse and remand under its power of supervision.

VI. REASONS FOR GRANTING THE WRIT

In a clear violation of the statutes limiting federal jurisdiction, the District Court accepted removal and proceeded with the case when the requisite diversity of citizenship was lacking or uncertain, and the Ninth Circuit ignored the obvious jurisdictional defect when it was made clear by the state appellate court judgment. The case at bar also presents a flagrant example of the inequities the doctrine of *Erie Ry* v. *Tompkins,* 304 U.S. 64 (1938), sought

to prohibit. Under the Ninth Circuit decision (App. A) a foreign underwriter, with the right to remove to a federal court could invoke the suicide exception based only on "principle," suspicion or conjecture, while a state domiciled insurer forced to defend in the state court would be required to prove suicide to a certainty. The practical result is that all a man buys with his life insurance premiums paid to a foreign underwriter is a bitter and expensive law suit for his widow. The local state law on the rights of a consumer is tersely summarized in *Salois* v. *Mutual of Omaha*, 90 Wn.2d 355, 581 P.2d 1349, 1351 (1978) as follows:

> "Although it has been established by the jury's verdict that she is entitled to recover under the policy and that Mutual of Omaha is guilty of bad faith in refusing to honor her claim for benefits, the necessity to employ and pay her attorneys has deprived plaintiff of an adequate recovery. Her victory is a pyrrhic one if a victory at all."

The *Salois* court remanded to the trial court for fixing damages and attorney's fees as provided under WCPA.

(a) The District Court did not have jurisdiction to accept removal and proceed with case while the state court dismissal of non-diverse citizens was not final (and was ultimately reversed).

Under local law, the appeal from the order dismissing the non-diverse citizen defendants suspended the order of dismissal. The non-diverse defendants were still parties to the action. See *In Re Brown*, 107 P.2d 1104, 6 Wn.2d 215, 235 (1940), quoted on page 13 *infra*.

Strawbridge v. *Curtiss*, 3 Cranch 267 (1806), and its progeny, as well as 28 U.S.C. 1332 and 1441, require diversity between plaintiff and all defendants. With non-diverse party defendants properly in the action, the *District Court had no jurisdiction*. Neither diversity nor jurisdictional requirements can be waived and the parties can not create jurisdiction by stipulation, by estoppel, or by failure to raise the issue. *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 28 L.Ed. 462, 4 S.Ct.510 (1884); *McNutt* v. *G.M.A.C.*, 298 U.S. 178 80 L.Ed. 1135, 56 S.Ct.

780 (1935); *Louisville & N.R. Ry. Co.* v. *Mottley*, 211 U.S. 149, 53 L.Ed. 126, 29 S. Ct. 42 (1908). As these cases demonstrate, federal courts are courts of limited jurisdiction, and when the facts underlying jurisdiction are challenged, as they were here, "the burden is on the party claiming jurisdiction to demonstrate that jurisdiction of the subject matter exists." Wright, *Law of Federal Courts* (4th Ed. 1983) 23.

It was unlawful for the District Court to accept removal and to deny remand when dismissal of non-diverse co-defendants was involuntary[2] or at least a stay with knowledge that the dismissal was on appeal, or that federal jurisdiction was uncertain. Then, when the non-diverse defendants were reinstated by the state court of appeals (App. C), every vestige of federal jurisdiction evaporated. Despite the official communication to the Ninth Circuit that the Washington-citizen defendants had been reinstated by the final judgment of the state court of appeals, and the Ninth Circuit *knew* that diversity did not exist, it ignored its duty to remand.

This is a significant issue of law, fully supported by all the decisions of this Court. *See Southern Ry. Co.* v. *Lloyd*, 36 S.Ct.210, 239 U.S. 496, 60 L.Ed.402 (1916). Petitioner respectfully suggests that the federal courts below have allowed themselves to be duped by a multi-billion dollar corporation into ignoring the restrictions on federal jurisdiction. This issue should be authoritatively resolved by this Court to avoid any future frustrations on the issue. Chief Justice Burger commented in *Maness* v. *Meyers*, 419 U.S. 449 at 460 (1975):

> "Remedies for judicial error may be cumbersome but the injury flowing from an error generally is not irreparable, and orderly processes are imperative to the oepration of the adversary system of justice."

While this Court has the power to correct this error, the hardships it has caused are approaching the irreparable. It should not be allowed to happen again.

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[2]Moore, *Federal Practice* Vol. 1A, Sec. O.168 [3-5] pps. 597-598 (1983 Ed.)

(b) This case presents a flagrant violation of the *Erie Ry* v. *Tompkins* doctrine by refusing to follow the settled state local law that a life insurer cannot lawfully invoke the suicide exception unless it has proof of suicide to a certainty.

The decisions of the highest state court in Washington require that an insurer must have proof of suicide to a *certainty* to overcome the presumption against suicide. The gravamen of petitioner's complaint is that MONY and its de facto decision making officers did not have evidence to meet this standard. The rule of local law established by the highest state court is tersely explained in *Burrier* v. *MONY*, 63 Wn.2d 266, 387 P.2d 58 (1963), a case in which the facts are identical for all practical purposes with this case. The *Burrier* court authoritatively established that MONY had the burden of proving suicide in the following language:

> "Men do foolish things and they do dangerous things and they are careless and they die alone, unattended and forsaken, and why they die we sometimes never learn for we know only what we know. The jury did not know that Ralph Burrier took his life; *it was the defendant's burden to prove it.*" (emphasis supplied) [387 P.2d at 61].

Burrier mandates that the insurer must prove suicide to a certainty, with evidence that the manner of death was:

> "...consistent with the theory of suicide and at the same time inconsistent with any reasonable hypothesisis of death by accident or the act of another." [387 P.2d 61].

To emphasize the requirement that MONY must have proof of suicide to a certainty, the *Burrier* opinion further states:

> "*Both parties* to a life insurance policy are held to have *contracted with knowledge of the presumption against suicide*... the insured is entitled to know, as a contracting party, that in the event of his death under inexplicable circumstances... or where as here, *the evidence can be viewed as consistent with suicide, the death will be presumed accidental rather than suicide*... If the presumption puts

> some added burden of proof than that prescribed by the ordinary burden of proof, *it is a burden held to have been contemplated by the parties when they made their contract of insurance with each other.*" (emphasis supplied) [387 P.2d at 63, 64].

In this WCPA suit, MONY does not contend that it ever had evidence of certainty required under the *Burrier* rule, but instead admits reliance upon suspicion and conjecture; it rejected the claim as a matter of principle. The record here contains a letter from Bailey to MONY's home office dated December 12, 1979 which states in part:

> "Vaughn Evans [plaintiff's counsel] contends an appeal is further evidence of bad faith. He stated in a telephone conversation today that Mutual Life Insurance Company of New York knew the state of the law on instructions involving the presumption against suicide, that they accepted premiums in accordance with the law and that he considers any appeal to be evidence of bad faith. It is distressing that he does not allow that the law on presumptions is in a state of flux and that he fails to see that the issue of law regarding instructions on presumptions is open to serious debate and that your decision to seek review in this matter is not based on economics but is rather *based on principle.*" (Emphasis supplied). (Excerpt of record on appeal page 202).

Under the decisions of the highest court of the state, an insurer must have reasonable justification for rejecting a claim. *Levy* v. *North Am. Co. for Life and Health Ins.*, 90 Wn.2d 842, 586 P.2d 845 (1978).

MONY's answer in the case at hand alleges that it had an honest belief that the death was suicide. Neither the terms of the policy nor Washington common law provide for a lawful rejection based on the suicide exception, solely on some unknown claim adjuster's belief, nor as a matter of principle. Proof of suicide to a certainty is required and without such proof of certainty the rejection is without justification.

The highest court of the State of Washington has held that the wrongful rejection of a claim violates both the Washington Insurance Code, RCW 48.01.030 and WCPA. See *Salois* v. *Mutual Life of Omaha Ins. Co.*, 90 Wn.2d 355, 681 P.2d 1339 (1978).

Despite the local law that an insurer must have proof of suicide to a certainty, the Ninth Circuit affirmed the District Court with the acknowledgment that the cause of death was "inconclusive" and that there was "extreme uncertainty surrounding Vick's death."[1] If a jury were to reach the same conclusion in the trial of this action, it would be compelled, under Washington law, to return a verdict for petitioner.

By refusing to follow the state law as set out in *Salois* and *Levy*, as well as *Burrier*, the federal courts below have not only violated the mandate in *Erie Ry.* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938), but have also violated 28 U.S.C. 1652. This presents a flagrant case of a federal court invading the judicial authority granted to the state and the denial of the state's independence. As stated in *Erie Ry.* v. *Tompkins*, this constitutes an unconstitutional assumption of powers by courts of the United States.

(c) The Ninth Circuit should have recognized it could not rely on a state court opinion in which reconsideration had been granted and which was in fact withdrawn.

The Ninth Circuit opinion, App. A at A-3, A-4, and A-5, relies on the state Supreme Court opinion in *Schroeder* v. *Royal Globe Ins. Co.*, 99 Wn.2d 65, 659 P.2d 509 (1983), as being the law of the state. Yet, as recognized by the Ninth Circuit opinion at A-3 and A-4, the state supreme court had granted reconsideration in that case. Under local law, the mere filing of a motion for reconsideration suspends an opinion. Here, not only had there been a motion for reconsideration, *but it had been*

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[1] *Gould* v. *MONY*, 735 F.2d 1165 (9th Cir-1984) [*Gould III*], App. A. at A-4

granted. The rule of local law of the highest state court in *In re Brown*, 6 Wn.2d 215, at 235 (1941) states:

> "In *Hutchings* and *Dishman* cases, petitions for rehearing having been granted, the departmental opinions were 'vacated' as provided by the statute above quoted. In the case at bar, *the opinion was suspended by the filing of the petition for rehearing*. In neither instance did the opinion ever become final; *the moment for the entry of judgment by this Court never arrived*. Insofar as the questions here presented are concerned, whether an opinion be vacated or suspended, the result is the same." (Emphasis supplied).

The Ninth Circuit refused to recognize, not only that the *Schroeder* opinion had been suspended, as stated in its published opinion, but that *before it rendered its opinion,* the highest court of the State had withdrawn section III of that decision (which deals with WCPA), and held it to have no precedential value whatsoever. See 101 Wn.2d 830, 683 P.2d 183 (1984). Despite the withdrawal of the only vestige of authority upon which the Ninth Circuit could base its opinion, it nevertheless cites *Schroeder* as authority for its usurpation of the state court's independence.

This too, is a flagrant violation of the authority and jurisdiction of the federal courts under both *Erie* and 28 U.S.C. 1652.

(d) Both the District Court and the Ninth Circuit should have certified what they considered unclear issues of local law to the state Supreme Court under the local Law Certification Act.

Both the District Court and the Ninth Circuit were requested to certify the issues of local law to the state Supreme court under the state uniform certification of question act, RCW 2.60.020. See A-4. They refused to do so.

This statute permits "any federal court" to "ascertain the local law" of this state in a case in which "the local law has not been clearly determined" by certifying "to the supreme court" of this state "the question of local law involved." The state supreme court must then "render its opinion in answer thereto."

This Court has enthusiastically shown its approval of the use of such certification statutes to ascertain local law. *Clay* v. *Sun Insurance Office, Ltd.*, 377 U.S. 179 (1964); *Lehman Bros.* v. *Shein*, 416 U.S.386 (1974). Indeed, in the *Lehman Bros.* case, although the court said resort to such statutes is not obligatory, and that their use rests in the sound discretion of the federal court, the certification process "does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism." 416 U.S. at 391. The Court then held it was error for the courts below not to use the certification statute. In this case, it was error for the courts below not to use the certification statute to satisfy their obligation under *Erie Ry* v. *Tompkins*, 304 U.S. 64 (1938), to ascertain and follow local law.

While petitioner contends the local law is clear that WCPA provides for recovery when an insurer denies a claim without reasonable justification, if the federal courts had any doubt its application to the facts here the issue should have been certified.

(e) The Federal court violated the doctrine of collateral estoppel by judgment when it relitigated the identical issue settled by the final state court judgment.

The legal issue of whether MONY as well as its attorneys would be liable under WCPA for rejecting petitioner's claim, when they had no evidence to prove suicide to a certainty, was fully litigated to a final judgment in *Gould* v. *MONY*, 37 Wn.App.756, 683 P.2d 207 (1984) [*Gould* II] App.-C. That opinion states at App C-4:

> "The allegations of Gould's complaint state a basis which, if proven, would permit a finding of liability against Mutual [MONY]."

The gravamen of petitioner's complaint is that MONY and its attorneys rejected petitioner's claim without having any evidence required under local law to prove suicide — i.e., evidence of suicide to a certainty required under *Burrier* v. *MONY*, 63 Wn.2d 266, 387 P.2d 58 (1963). The Ninth Circuit was officially informed of the final judgment of the state Court of Appeals (App-C) before rendering its decision. (App-A)

The doctrine of collateral estoppel by judgment precludes the federal court from relitigating issues which have been conclusively put to rest by the final state court judgment. *Montana* v. *United States*, 440 U. S. 147, 54 L.Ed 2d 210, 99 S.Ct. 970 (1979). All the elements of estoppel by judgment are here present. There is privity between MONY and its attorneys; the identical issues were presented and decided; there has been no change in the substantive law; there has been no change in the facts; there is no moral or ethical reason why MONY should have a second chance to litigate.

The federal courts are precluded from relitigating these issues, in particular in holding that an insurer does not act in bad faith when, in reliance on uncertainties, it invokes the suicide exception to reject a claim.

Respectfully submitted,

Vaughn E. Evans
Attorney for Petitioner

APPENDIX A

735 F.2d 1165 [*Gould III*]

HARRIET M. GOULD,
Plaintiff-Appellant,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Defendant-Appellee.

No. 83-3790.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.
Argued and Submitted Jan. 4, 1984.
Decided June 25, 1984.

TANG, Circuit Judge:

FACTS

In May 1976, Vick Gould was found shot to death in a public park in Bellevue, Washington. He was killed by a bullet that entered through the base of his skull. Vick was insured under a life insurance policy issued by Mutual Life Insurance Company of New York ("MONY"). The policy insured against accidental death, but excluded death by suicide. Plaintiff Harriet Gould, the insured's widow and beneficiary of the policy, submitted a claim to collect the $25,000 proceeds of the policy. MONY refused payment, claiming that the death was by suicide.

Plaintiff then brought an action in state court to enforce the policy. MONY raised the policy's suicide exclusion clause as an affirmative defense. The jury returned a verdict for plaintiff and, on appeal, the Washington Supreme Court affirmed. *Gould v. Mut. Life Ins. Co.*, 95 Wash.2d 722, 629 P.2d 1331 (1981) (en banc).

Thereafter, plaintiff brought an action in state court pursuant to the Washington Consumer Protection Act, Wash.Rev.Code § 19.86.020, seeking damages and attorney's fees, based on MONY's alleged bad faith refusal to honor the life insurance policy claim. The case was then removed to the United States District Court for the Western District of Washington. The federal trial court held, as a matter of law, that MONY's denial of policy benefits was neither frivolous, nor unfounded and granted summary judgment in favor of the insurance company. The court also denied a postjudgment motion for relief from judgment and a further motion for leave to amend the complaint to allege outrage. Plaintiff timely appeals.

ANALYSIS

I. *Summary Judgement*

[1] Our review of the grant of summary judgement on a question of law is *de novo*. *Walker v. Navajo-Hopi Indian Relocation Comm'n*, 728 F.2d 1276 (9th Cir. 1984). We must determine that there is no genuine issue of material fact and that the party moving for summary judgement should prevail as a matter of law. *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 677 (9th Cir.1984).

Washington's Consumer Protection Act prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . ." Wash.Rev.Code § 19.86.020. Any person injured by a violation of that prohibition may recover actual damages, costs of suit (including attorney's fees), and punitive damages. Wash.Rev.Code § 19.86.090.

[2] An insurer's breach of its duty to deal with an insured

in good faith constitutes a violation of the Consumer Protection Act. *Levy v. North Am. Co. for Life and Health Ins.*, 90 Wash.2d 846, 848, 586 P.2d 845, 847-48 (1978) (citing *Salois v. Mut. of Omaha Ins. Co.*, 90 Wash.2d 355, 581 P.2d 1349 (1978)). Yet "the mere denial of benefits due to a debatable question of coverage is insufficient" to demonstrate bad faith. *Miller v. Indiana Ins. Cos.*, 31 Wash.App. 475, —, 642 P.2d 769, 771 (1982).

[3] In the case at bar, the facts reveal, as a matter of law that there was a debatable question of coverage, which provided the insurance company with a reasonable and valid ground on which to oppose payment of the proceeds of the policy. *See Phil Schroeder, Inc. v. Royal Glode Ins. Co.*, 99 Wash.2d 65, 74, 659 P.2d 509, 514 (1983) (en banc), *reconsid'n granted*, 99 Wash.2d 1019 (May 31, 1983).

MONY had available to it considerable evidence pointing to suicide. This evidence included, *inter alia:* Vick's gloves were determined to have been used to fire a gun; a revolver belonging to the deceased was found beside the body; the bullet that killed Vick was of the same caliber and composition as the unfired cartridges in his revolver; Vick discussed suicide on a couple of occasions with a friend and discussed life insurance coverage in case of suicide.

We recognize that there also was evidence that was inconsistent with suicide. Such evidence raises a genuine issue of material fact as to how Vick died. In view of the above contravening evidence, however, it does not raise a material question as to MONY's good faith.

In its en banc review of the *Gould* case, the Supreme Court of Washington noted that "[a]t trial evidence was produced to support both theories [homicide and suicide]." *Gould*, 95

Wash.2d at 723, 629 P.2d at 1331. Moreover, the trial court denied both plaintiff's motion for summary judgment and motion for a directed verdict on the suicide defense issue.

We acknowledge that the evidence as to the cause of death was sufficiently inconclusive as to require a jury determination. Yet no evidence of MONY's alleged bad faith has been presented and the extreme uncertainty surrounding Vick's death raised a debatable question of coverage as a matter of law.

II. *Amendment to Allege Outrage*

Plaintiff challenges the district court's refusal to grant leave to amend the complaint to allege the tort of outrage. The petition for leave to amend was included in plaintiff's postjudgment motion for relief.

[4,5] An insurer's refusal to pay policy benefits may involve conduct constituting the tort of outrage. *Rounds v. Union Bankers Ins. Co.*, 22 Wash.App. 613, 614, 590 P.2d 1286, 1287-88 (1979). Yet MONY's conduct cannot "reasonably be regarded as . . . extreme and outrageous . . . ." *Id* at 617, 590 P.2d at 1288. Amendment of the complaint would, therefore, have been futile and the district court's refusal to grant leave to amend was proper.

III. *Certification to the State Court*

[6] Plaintiff also renews her motion to certify the present appeal to the Washington Supreme Court. That court recently reiterated the reasonableness standard as the measure that is to be applied to determine good faith under the Washington Consumer Protection Act. *Schroeder*, 99 Wash.2d at 73, 659 P.2d at 514. The court has since granted reconsideration of *Schroeder*. Although it is unclear, plain-

tiff's certification motion is apparently the result of this decision.

The motion must be denied. No compelling reason to use that procedure has been identified. The reasonableness standard articulated in *Schroeder* is a reiteration of the standard established in *Levy*, 90 Wash.2d 846, 586 P.2d 845. There is no reason to believe that the court would modify the reasonableness requirement on reconsideration of the particular facts in *Schroeder*.

IV. *Other Issues*

[7] Plaintiff complains of a pattern of unfair practices by MONY, in violation of the Washington Administrative Code. She has shown no exceptional circumstances why this issue was not raised below. *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652 (9th Cir.1984). We therefore decline to pass on this question. *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 812 (9th Cir.1982).

[8] Plaintiff also complains because the district court did not compel discovery before granting summary judgement. Although plaintiff requested imposition of sanctions, no motion to compel discovery was presented.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HARRIET M. GOULD,
Plaintiff,
v.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant.

No. C82-230R

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
MARCH 1, 1983
BRUCE RIFKIN, *Clerk*
By . *Deputy*

THIS MATTER comes before the court on plaintiff's motion for summary judgment on the issue of liability and defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, or in the alternative, for summary judgment. Matters outside the pleadings have been presented in support of defendant's motion, the motion will be treated as one for summary judgment. R. 12(b). No material facts are in dispute.

Vick Gould was found shot to death in Robinswood Park in Bellevue, Washington on May 27, 1976. He was insured under a group life insurance policy issued by defendant Mutual Life Insurance Company of New York (MONY). The policy insured against accidental death but excluded any loss resulting from suicide.

Harriet Gould, the insured's widow and beneficiary of the policy, submitted a claim for the $25,000 in policy benefits. MONY denied payment on the ground that the death had resulted from suicide. Plaintiff instituted a lawsuit in the Superior Court of the State of Washington against MONY to obtain the $25,000. MONY asserted the suicide exclusion as an affirmative defense. Before trial, plaintiff moved for summary judgment against the defendant insurer. The motion was denied. At the close of the presentation of evidence plaintiff moved for a directed verdict. The court denied to motion, noting that evidence had been presented by defendant that would allow the jury to determine whether or not defendant has met its burden of proving suicide.

The jury returned a verdict in plaintiff's favor in the amount of $25,000. Defendant appealed. Plaintiff moved to dismiss the appeal as frivolous; the motion was denied. The Supreme Court of Washington affirmed the judgment. *Gould v. Mutual Life Insurance Company of New York*, 95 Wn. 2d 722 (1981).

Plaintiff brings this action against defendant under the Washington Consumer Protection Act, "seeking recovery of plaintiff's damages, attorneys' fees and punitive damages

as provided in RCW 19.86.090 for the bad faith refusal of MONY to honor plaintiff's claim." Plaintiff's Memorandum in Support of Two Motions (Dec. 27, 1982) at 2-3. Plaintiff's theory of recovery begins with the assertion, not disputed by defendant for purposes of this motion, that the insured and the carrier contracted with knowledge of the presumption against suicide and of the carrier's burden, in order to utilize the suicide exclusion, of proving that death occurred in a manner inconsistent with accident. *See Gould v. Mutual Life Insurance Company of New York*, 95 Wn. 2d at 725; *Burrier v. Mutal Life Insurance Co.*, 63 Wn. 2d 266 (1963). Plaintiff's theory continues with the following syllogism:

1. Unless the carrier has evidence sufficient to carry its burden, its denial of coverage was a violation of its fiduciary duty of good faith and fair dealing.

2. The carrier lacked evidence to carry its burden and litigated solely in an effort to change existing law.

3. The carrier breached its duty of good faith and fair dealing and is therefore liable under the Consumer Protection Act. *Salois v. Mutual of Omaha*, 90 Wn. 2d 355 (1978).

The court agrees with the defendant that plaintiff's major premise is erroneous. If plaintiff's theory were the law, every insurer that ultimately lost a lawsuit concerning coverage would be liable per se under the Consumer Protection Act. The chilling effect on insurers' rights of access to the courts would be obvious. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Rather, the rule is that mere denial of benefits due to a debatable ques-

tion of coverage is insufficient to show bad faith. *Miller v. Indiana Insurance Cos.*, 31 Wn. App. 475, 479 (1982); *Pruitt v. Alaska Pacific Assurance Co.*, 28 Wn. App. 802, 804-05 (1981). "Bad faith requires a showing of a frivolous and unfounded denial of benefits." *Miller*, 31 Wn. App. at 479. Absent such a showing, a carrier that refused payment under a policy cannot be held liable for that refusal under the Consumer Protection Act.

Plaintiff's claim of bad faith rests solely on the allegation that defendant refused, "without any evidence to support a defense of suicide," to pay under the policy, which resulted in plaintiff bringing the state court lawsuit. Complaint VI, VII. Unless that refusal was frivolous and unfounded, plaintiff's claim must fail.

The court is of the opinion that, as a matter of law, defendant's refusal to pay under the policy was neither frivolous nor unfounded. Persuasive in this regard is the statement of the Washington Supreme Court in the reported opinion affirming the judgement in favor of plaintiff:

> At trial evidence was produced to support both theories.

95 Wn. 2d at 723. Also significant is the pretrial ruling which denied plaintiff's motion for summary judgment, holding that a question of fact existed as to whether Vick Gould took his own life. Moreover after all the evidence in the case had

been presented, plaintiff moved for a directed verdict. Such a motion may be granted only where there is no competent evidence nor reasonable inference which would sustain a jury verdict in favor of the non-moving party. *Levy v. North American Insurance*, 90 Wn. 2d 846, 851 (1978). The motion was denied.

Plaintiff's argument that it cannot be bound by these determinations because of lack of identity of issues is plainly without merit. The only issue raised by the plaintiff's motions was whether there existed a debatable question of coverage sufficient to take the affirmative defense to the jury. And although the appeal was concerned with the propriety of the court's instruction to the jury on the presumption against suicide, the court recognized that evidence had been presented "to support" both theories, that is, that a jury verdict for defendant would have been legally possible. These questions were actually litigated by plaintiff and, as they placed in issue defendant's right to rely on the suicide exclusion, were essential to the judgment. *See Seattle-First National Bank v. Kowachi*, 91 Wn. 2d 223, 228 (1978); Defendant's Memorandum in Support of Motion for Dismissal (Dec. 28, 1982), Exhibits G & H. In sum, plaintiff cannot show that defendant's denial of policy benefits was frivolous and unfounded. Accordingly, defendant is entitled to summary judgement.

It is indeed unfortunate that MONY's war on the presumption had to be waged in Mrs. Gould's case. This is especially so since the amount at issue was relatively small and the costs, both emotional and financial, undoubtedly large. However, as a matter of law, the defense of this lawsuit, aggressive, costly and futile as it was, did not constitute a Consumer Protection Act violation.

Plaintiff's motion for summary judgment is DENIED. Defendant's motion for summary judgment is GRANTED.

IT IS SO ORDERED.

The Clerk of the Court is directed to enter judgment dismissing the complaint and to forward copies of this order and the judgment entered to counsel of record.

DATED at Seattle, Washington this 28th day of February, 1983.

s/s BARBARA J. ROTHSTEIN
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HARRIET M. GOULD. *Plaintiff.* v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. *Defendant.*	No. C82-230R ORDER DENYING PLAINTIFF'S MOTIONS FOR RELIEF FROM JUDGMENT AND CERTIFICATION

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
APRIL 10, 1983
BRUCE RIFKIN, *Clerk*
By . . . . . , *Deputy*

ON MARCH 1, 1983 this court entered an order denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment. Judgment was entered dismissing the action March 2, 1983. Plaintiff now moves for relief from judgment pursuant to Fed. R. Civ. P. 59 and 60 and for certification of state law, issues to the Washington Supreme Court.

Plaintiff argues that the court's order holding plaintiff's Consumer Protection Act claim insufficient as a matter of law is riddled with errors. Plaintiff protests the court's use of a case not cited by the parties, claiming a deprivation of due process of law thereby. Plaintiff disputes the court's interpretation of Washington consumer protection law and the complaint, attempting to recharacterize her claim.

Plaintiff requests oral argument of unlimited duration and the opportunity to present yet another brief of excessive length.

The motions are without merit. This court's interpretation of applicable law was confirmed by the Washington Supreme Court in *Phil Schroeder, Inc. v. Royal Globe Insurance Co.*, 99 Wn. 2d 65, 74 (1983). There, the insurer's refusal to pay under a policy was based on its erroneous interpretation of policy language. Since the interpretation was debatable under prior law, however, the court refused to allow liability against the insurer under the Consumer Protection Act. Similarly, although defendant's theory of this case was ultimately not accepted by the jury, it was supported by evidence capable of sustaining a jury verdict. The Consumer Protection Act affords no remedy under these circumstances.

Plaintiff's motions for relief from judgment and for certification to the Washington Supreme Court are DENIED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 15th day of April, 1983.

s/s BARBARA J. ROTHSTEIN
United States District Judge

APPENDIX C

37 Wn.App.756,683 P.2d 207 (1984) [*Gould II*]

HARRIET M. GOULD,
Appellant,
v.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Defendant,
ROBERT L. ISRAEL, ET AL,
Respondents.

No. 11463-8-I.
Division One.
April 23, 1984.

SCHOLFIELD, J. — Harriet M. Gould appeals a final judgment dismissing her complaint against Robert L. Israel and C. William Bailey, their wives and respective marital communities. We reverse.

Israel and Bailey brought a motion for judment on the pleadings to dismiss Gould's complaint. They specifically alleged and rely on the provisions of CR 12(b)(6), which permits a party to move for dismissal of a claim against him for "failure to state a claim upon which relief can be granted".

Because of the nature of the motion, we refer to the pertinent portions of Gould's "First Amended Complaint", wherein she alleges:

1. She is sole beneficiary on an accidental death insurance policy issued on the life of her now deceased husband by the defendant, Mutual Life Insurance Company of New York.

2. That without any evidence to support a defense of suicide, defendant Mutual and its attorneys and agents Israel and Bailey made a decision to refuse to pay the death benefits due Gould and forced her to press her claim through trial and appeal to the Supreme Court, where she ultimately prevailed.

3. That the actions of Israel and Bailey were not limited to rendering services as attorneys of Mutual, but included participation in and managing the wrongful and bad faith conduct as agents of Mutual Life Insurance Company of New York, including, but not limited to, making command decisions to wrongfully and in bad faith deny plaintiff's claim, initiating and approving conduct designed solely to harrass [*sic*] and humiliate plaintiff and cause her mental distress, with intent to intimidate plaintiff into abandoning her claim or settling for a mere fraction of the benefits to which plaintiff was entitled and for which plaintiff had paid premiums.

4. That the conduct of each of the defendants constituted bad faith and unfair and deceptive acts and practices in violation of the Consumer Protection Act, RCW 19.86.

Gould first contends that the dismissal of Israel and Bailey was not a final judgment and did not terminate the action as to them because the record is insufficient to support the findings required by CR 54(b) "that there is no just reason for delay", citing *Doerflinger v. New York Life Ins. Co.*, 88 Wn.2d 878, 567 P.2d 230 (1977). A motion to that effect was presented to Court of Appeals Commissioner Jordan and denied April 22, 1982. Because Gould did not move to modify that ruling pursuant to RAP 17.7, the ruling of the commissioner became the final decision of the court.

Israel and Bailey contended that there is no possible basis for a cause of action against them by Gould because Gould is not an insured, only a beneficiary, on the policy. In making this argument, they rely upon *Rice v. Life Ins. Co. of N. Am.*, 25 Wn. App. 479, 609 P.2d 1387 (1980). In *Rice*, the Court of Appeals stated in dicta that one who is not an insured does not have a cause of action against an insurance company under the Consumer Protection Act.

[1] The sole authority cited for this proposition was the case of *Rounds v. Union Bankers Ins. Co.*, 22 Wn. App. 613, 590 P.2d 1286 (1979). We read the language from the *Rounds* opinion, cited and relied upon in *Rice*, as holding that there was a legislative intent to provide a remedy for an *insured* who suffers damages due to conduct such as that alleged against the defendant in that case. The *Rounds* opinion does not address the question of whether a beneficiary to a life insurance policy would or would not have a cause of action against the life insurance company under the Consumer Protection Act.

If an insured has a cause of action against an insurance campany for bad faith in the manner in which the insurance company processes a claim against it, there is nothing in the language of the Consumer Protection Act to suggest that a beneficiary of a policy would not also have a cause of action against the insurance company under similar circumstances. Because there is no logical basis upon which to distinguish Gould from the insured under the circumstances of this case, we decline to hold that a beneficiary of a life insurance policy does not have a cause of action against the insurer under the Consumer Protection Act for bad faith in settling her claim.

[2] In addressing a motion to dismiss under CR 12(b)(6), our Supreme Court stated:

> We have repeatedly said that a motion made pursuant to CR 12(b)(6) must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Halverson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Berge v. Gorton*, 88 Wn.2d 756, 759, 567 P.2d 187 (1977). Factual allegations of the complaint must be accepted as true for purposes of the CR 12(b)(6) motion. *Berge v. Gorton, supra* at 759; *Standard v. Bolin*, 88 Wn.2d 614, 615, 565 P.2d 94 (1977); . . .

Corrigal v. Ball & Dodd Funeral Home, Inc., 89 Wn.2d 959, 961-62, 577 P.2d 580 (1978).

[3] The law is clear that corporate officers and agents can incur personal liability under the Consumer Protection Act, RCW 19.86.140, *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976), *appeal dismissed*, 430 U.S. 952 (1977), and that an insurance company which breaches its duty to act in good faith is subject to liability under the act. *Salois v. Mutual of Omaha Ins. Co.*, 90 Wn.2d 355, 581 P.2d 1349 (1978).

The allegations of Gould's complaint state a basis which, if proven, would permit a finding of liability against Mutual.

RCW 19.86.020 provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

The complaint charges Mutual with acting wrongfully and in bad faith in denying Gould's claim.

The issue here, however, is whether the complaint states grounds upon which, if proven, Gould could be granted a

recovery against Israel and Bailey and their respective marital communities. In support of their motion to dismiss, Israel and Bailey emphasize that they are attorneys at law and all their actions in this case were done as attorneys representing their client, Mutual.

The complaint, however, alleges that Israel and Bailey acted outside the scope of the normal and traditional role of an attorney representing a client. The complaint alleges specifically:

> That the acts and conduct of defendants Robert L. Israel and C. William Bailey were not limited to services of attorneys, but included participation in and managing the wrongful and bad faith conduct as agents of Mutual Life Insurance Company of New York, including, but not limited to, making command decisions to wrongfully and in bad faith deny plaintiff's claim, initiating and approving conduct designed solely to harrass [*sic*] and humiliate plaintiff and cause her mental distress[.]

For the purposes of this motion, these allegations must be accepted as true. If the allegations are correct, then Bailey and Israel acted as de facto corporate officers and in that capacity engaged in conduct for which personal liability can be imposed. We believe this to be the fair intendment of the complaint. It follows that the fact that Israel and Bailey are attorneys at law would not protect them from liability imposed on proof of the allegations of the complaint.

Under these circumstances, a judgment of dismissal under CR 12 cannot lie.

Judgment reversed and remanded for further proceedings.

WILLIAMS, J., and SODERLAND, J. Pro Tem., concur.

Reconsideration denied June 12, 1984.

APPENDIX D

RCW 2.06.010. Court of appeals established—Definitions

There is hereby established a court of appeals as a court of record. For the purpose of RCW 2.06.010 through 2.06.100 the following terms shall have the following meanings:

. . .

(3) "Court " means court of appeals.

RCW 2.06.030. General powers and authority—Transfers of cases—Appellate jurisdiction, exceptions—Appeals

The administration and procedures of the court shall be as provided by rules of the supreme court. The court shall be vested with all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgements, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state.

For the prompt and orderly administration of justice, the supreme court may (1) transfer to the appropriate division of the court for decision a case or appeal pending before the supreme court; or (2) transfer to the supreme court for decision a case or appeal pending in a division of the court.

Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all cases except:

(a) cases of quo warranto, prohibition, injunction or mandamus directed to state officials;

(b) criminal cases where the death penalty has been decreed;

(c) cases where the validity of all or any portion of a statute, ordinance, tax, impost, assessment or toll is drawn into question on the grounds of repugnancy to the Constitution of the United States or of the state of Washington, or to a statute or treaty of the United States, and the superior court has held against its validity;

(d) cases involving fundamental and urgent issues of broad public import requiring prompt and ultimate determination; and

(e) cases involving substantive issues on which there is a direct conflict among prevailing decisions of panels of the court or between decisions of the supreme court;

all of which shall be appealed directly to the supreme court: *Provided*, That whenever a majority of the court before which an appeal is pending, but before a hearing thereon, is in doubt as to whether such appeal is within the catagories set forth in subsection (d) or (e) of this section, the cause shall be certified to the supreme court for such determination.

The appellate jurisdiction of the court of appeals does not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy, or the value of the property does not exceed the sum of two hundred dollars.

The court shall have appellate jurisdiction over review of final decisions of administrative agencies certified by the superior court pursuant to RCW 34.04.133.

Appeals from the court to the supreme court shall be only at the discretion of the supreme court upon the filing of a petition for review. No case, appeal or petition for a writ filed in the supreme court or the court shall be dismissed for the reason that it was not filed in the proper court, but it shall be transferred to the proper court.

Supreme Court, U.S.
FILED
MAR 21 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1330

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

RESPONDENT MUTUAL LIFE INSURANCE COMPANY OF NEW YORK'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BEST AVAILABLE COPY

I.

QUESTION PRESENTED

Whether "special and important reasons" exist which would warrant the granting of this Petition for Writ of Certiorari?

II.

PARTIES

Harriet M. Gould, petitioner, a Washington citizen; Mutual Life Insurance Company of New York (hereinafter referred to as MONY), respondent, a New York corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1330

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Respondent.

RESPONDENT MUTUAL LIFE INSURANCE COMPANY OF NEW YORK'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mutual Life Insurance Company of New York (hereinafter MONY) respectfully submits this response to petitioner Harriet M. Gould's Petition for a Writ of Certiorari to Review the Decision and Judgment of the United States Court of Appeals for the Ninth Circuit.

I.

STATUTES

28 U.S.C. § 1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals, or a judge thereof shall so order.

28 U.S.C. § 1332(a):

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

28 U.S.C. § 1441:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a

State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

28 U.S.C. § 1446(b):

The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

II.

STATEMENT OF THE CASE

Petitioner brought this action in the Superior Court of the State of Washington under the Washington Consumer Protection Act, RCW 19.86, seeking damages from respondent MONY, its attorneys Robert L. Israel and C. William Bailey, and their marital communities, for the denial of her claim for the $25,000.00 benefits on a MONY policy on her husband's life. Petitioner had successfully litigated her entitlement to the proceeds in a prior state court action. Defendants Israel and Bailey had represented MONY in that litigation.

There is no dispute that petitioner and state court defendants Israel and Bailey at all times material have been residents of the State of Washington. There is also no dispute that respondent MONY is a New York corporation, and that petitioner's claim exceeds $10,000.00, exclusive of interest and costs. Had petitioner originally brought her claim against MONY in the United States District Court, that court would have had subject-matter jurisdiction. 28 U.S.C. § 1332 (a).

Defendants Israel and Bailey moved the state court for dismissal pursuant to Washington Civil Rule 12 (b)(6) (identical to Fed.R.Civ.P. 12(b)(6)). The state trial court granted defendants' motion.

Upon the dismissal of the resident defendants, respondent MONY filed a petition for removal pursuant to 28 U.S.C. § 1441 and § 1446 in the United States District Court for the Western District of Washington. The District Court thereupon took jurisdiction of peti-

tioner's claim against respondent MONY. In her Petition for Writ of Certiorari, petitioner identifies the marital communities of both Mr. Israel and Mr. Bailey as parties to this federal action. Defendants Israel and Bailey have at no time been parties to this action in the federal courts, and the Court should not be misled by petitioner's attempts to create a diversity question through their inclusion in the identification of parties contained in the petition.

Petitioner filed a motion for remand in the District Court, contending that as the original state court order dismissing defendants Israel and Bailey did not contain either an express determination that there was no just reason for delay or an express direction for the entry of judgment, the dismissal was not final in that petitioner had no right to appeal. (Washington Civil Rule 54(b), which is identical to Fed.R. Civ.P. 54(b)) *See* Appendix 1. Prior to the determination of petitioner's motion for remand, the state court entered an amended order dismissing defendants Israel and Bailey, including the C.R. 54(b) language which rendered the dismissal a final judgment. Petitioner took a timely appeal to the Court of Appeals of the State of Washington.

The entry of the order containing the C.R. 54(b) language rendered petitioner's motion for remand moot, and the motion for remand was accordingly denied by the U.S. District Court judge. *See* Appendix 2. Petitioner did not seek certification of the District Court pursuant to 28 U.S.C. § 1292(b) for the purpose of appealing the denial of the motion for remand to the United States Court of Appeals for the Ninth Circuit.

Subsequent to the District Court's denial of petitioner's motion for remand, petitioner affirmatively processed her lawsuit through the District Court. Two separate sets of interrogatories were served upon counsel for respondent MONY, together with a request for production of documents. Pursuant to the latter request, respondent produced to petitioner over 300 pages of documents. On the basis of responses to these discovery requests, petitioner filed in the District Court a motion for summary judgment, contending that she was entitled to a finding of liability under the Washington Consumer Protection Act as a matter of law. Concurrently, respondent filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), or in the alternative, a motion for summary judgment. Petitioner responded to respondent's motion in writing, and counsel participated in oral argument before the District Court at the hearing on the cross-motions for summary judgment.

The District Court granted defendant's motion for summary judgment, and denied plaintiff's motion for summary judgment. Judgment was entered accordingly, and petitioner's case was dismissed.

Subsequent to the entry of judgment, petitioner filed a motion for reconsideration, a motion for new trial and other relief provided by Rule 59, an amended motion for relief pursuant to Rules 59 and 60, and a second amended motion for relief pursuant to Rules 59 and 60. Memoranda and affidavits were filed with the court in support of these motions. The post-judgment motions were denied by the District Court. *See* Appendix 3.

Petitioner took a timely appeal to the United States Court of Appeals for the Ninth Circuit. Petitioner did not raise the issue of the propriety of removal from the state court to the District Court in either her initial brief to the Ninth Circuit, in her reply brief, or at oral argument before the Ninth Circuit. On June 25, 1984, the Ninth Circuit affirmed the District Court's judgment, dismissing petitioner's complaint. Petitioner next filed a petition for reconsideration of opinion dated June 25, 1984 and suggestion for rehearing en banc. Petitioner raised therein for the first time before the Ninth Circuit the issue of the District Court's jurisdiction. By order dated September 27, 1984, the Ninth Circuit denied the petition for reconsideration.

This petition for writ of certiorari followed.

III.

THIS PETITION FOR WRIT OF CERTIORARI FAILS TO SET FORTH ANY SPECIAL AND IMPORTANT REASONS AS LISTED IN SUPREME COURT RULE 17

Supreme Court Rule 17 sets forth the considerations governing review on a petition for writ of certiorari. That rule states:

> Rule 17. Considerations governing review on certiorari
>
> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's

discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The petition for writ of certiorari at bar does not state any manner in which the decision of the Ninth Circuit was in any way in conflict with another federal court of appeals, a state court of last resort, or departed so far from the accepted and usual course of judicial proceeding or so far sanctioned such a departure as to call for the exercise of this Court's power of supervision. Nor does the petition set forth any manner in which the Ninth Circuit's decision decides an important question of federal law which has not been settled by the United States Supreme Court, or decides any federal question in a way in conflict

with an applicable decision of the United States Supreme Court.

Respondent MONY respectfully submits that as no such special or important reason for granting the writ has been set forth, the petition for writ of certiorari should be denied.

A. The United States District Court had Jurisdiction Pursuant to 28 U.S.C. 1332 to Render a Judgment in This Case.

Petitioner contends that the District Court lacked jurisdiction and improperly allowed removal due to the fact that the resident defendants had been involuntarily dismissed from the state court action, from which appeal was pending. It is not disputed that petitioner is a resident of the state of Washington, while respondent MONY is a New York corporation, and that the claim exceeded $10,000.00, exclusive of interest and costs. Accordingly, the District Court would have had original jurisdiction of petitioner's claim against MONY had it been brought initially in the District Court. 28 U.S.C. 1332(a).

Even if it were to be assumed *arguendo* that removal was improper due to the pending state court appeal, petitioner's objection to the removal failed to address the grounds of irregularity on which she now seeks to contest propriety of the removal. In her Statement of Reasons in Support of Motion for Remand and Citations of Authority upon which movant relies (Appendix 1), petitioner stated only that she was entitled to a remand to the state court as the state court order dismissing the resident defendants did not contain the language of Washington Civil Rule 54(b), rendering such a final judgment. Petitioner claimed that as no

final judgment existed under Washington court rules, she had no right to appeal. As a state court order containing such language and rendering the judgment final was subsequently entered, and provided to the District Court, petitioner's motion to remand on the reasons stated became moot.

This court has repeatedly held that a United States District Court judgment will be upheld, even though irregularity may have existed in the removal to the federal courts, where the District Court would have had original jurisdiction of the claims before it had they initially been brought in the federal court. *Grubbs* v. *General Electric Credit Corp.*, 405 U.S. 699, 92 S. Ct. 1344 (1972); *American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6, 71 S. Ct. 534 (1951); *Mackay* v. *United Development Co.*, 229 U.S. 173, 33 S. Ct. 638 (1913); *Baggs* v. *Martin*, 179 U.S. 206, 21 S. Ct. 109 (1900). The rule has been stated as follows:

> There are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprise the case at the time of trial or judgment, the federal court would have had cognizance of the case. This circumstance was relied upon as a foundation of the holdings. The defendant who had removed the action was held to be estopped from protesting that there was no right to removal. Since the federal court could have had jurisdiction originally, the estoppel did not endow it with the jurisdiction it could not possess.

American Fire and Casualty Co. v. *Finn,* 341 U.S. at 16, 17, 71 S. Ct. at 541.

It is important to note that after the District Court determined petitioner's motion for remand to be moot, and denied the same, petitioner processed her claim through the Court to a final determination. *See* Statement of the Case, pages 4-7, *supra.* Petitioner did not request that the District Court certify the issue of removability to the Ninth Circuit, pursuant to 28 U.S.C. 1292, nor did petitioner present the issue to the Ninth Circuit either by brief or in oral argument. Only after the Ninth Circuit affirmed the judgment of the District Court did petitioner file her motion for reconsideration, presenting therein the issue of the District Court's subject-matter jurisdiction. As this Court has determined that the validity of a removal procedure followed may not be raised for the first time on appeal, *Grubbs* v. *General Electric Credit Corp., supra* at 700, it cannot be contended that the Ninth Circuit's denial of the petition for reconsideration has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

On the basis of the foregoing, respondent respectfully submits that petitioner's presentation of a jurisdictional issue here does not present a situation which meets the criteria set forth in Supreme Court Rule 17. As no special or important reason exists, respondent MONY respectfully submits that the petition for writ of certiorari should be denied.

B. Petitioner's Reliance On *Burrier* v. *Mutual Life Insurance Company of New York*, 387 P.2d 58, 63 Wn.2d 266 (1963) is Misplaced, as That Case Does Not Deal With the Standard of Proof Required in an Action Under the Washington Consumer Protection Act.

Petitioner contends the United States Court of Appeals for the Ninth Circuit refused to follow the settled law of the State of Washington concerning a life insurer's invocation of the suicide exclusion to a life insurance policy, citing *Burrier* v. *Mutual Life Insurance Company of New York*, 387 P.2d 58, 63 Wn.2d 266 (1963). The issue in *Burrier* v. *Mutual Life Insurance Company, supra* was whether a jury instruction setting forth the presumption against suicide was proper. The case involved no allegation that the insurer had acted unlawfully in asserting the suicide defense, nor was that issue before the court. The appellate courts of the state of Washington have yet to decide the character of evidence an insurer must have to lawfully assert the affirmative defense of a policy's suicide exclusion.

As recognized by the Ninth Circuit, an insurer's breach of its duty to deal with an insured in good faith constitutes a violation of the Washington Consumer Protection Act. *Levy* v. *North Am. Co. for Life & Health Ins.*, 586 P.2d 845, 847, 848, 90 Wn.2d 846, 848 (1978) (citing *Salois* v. *Mut. of Omaha Ins. Co.*, 581 P.2d 1349, 90 Wn.2d 355 (1978). However, the mere denial of benefits due to a debatable question of coverage is insufficient to show bad faith. *Miller* v. *Indiana Ins. Cos.*, 642 P.2d 769, 31 Wn.App. 475, 479 (1982); *Pruitt* v. *Alaska Pacific Assurance Co.*, 626 P.2d 528, 28 Wn.App. 802, 804, 805 (1981). Bad

faith requires a showing of a frivolous and unfounded denial of benefits. *Miller* v. *Indiana Ins. Cos., supra* at 479.

On the record before the District Court and the Ninth Circuit, a debatable question of coverage existed, which, as a matter of law, was insufficient to demonstrate bad faith under the Washington Consumer Protection Act. The portion of the record supporting the finding of the United States Court of Appeals for the Ninth Circuit is set forth at 735 F.2d at 1167, petitioner's Appendix A at A-3 and A-4.

Petitioner further contends that the Ninth Circuit's citation of *Phil Schroeder, Inc.* v. *Royal Globe Insurance Co.*, 659 P.2d 509, 514, 99 Wn.2d 6574 (1983 *en banc*) reconsideration granted, 99 Wn.2d 1019 (1983) modified, 683 P.2d 183, 101 Wn.2d 830 (1984), ". . . is a flagrant violation of the authority and jurisdiction of the federal courts under both Erie [*Ry.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 1938)] and 28 U.S.C. 1652." *See* Petition for Writ, at page 12. *Phil Schroeder, Inc.* v. *Royal Globe Insurance Co., supra,* is the sole decision of the Supreme Court of the State of Washington dealing with an insurer's liability under the Washington Consumer Protection Act based upon the outright denial of a claim. In a decision which paralleled the earlier decisions of the intermediate Court of Appeals of the State of Washington in *Miller* v. *Indiana Ins. Cos., supra* and *Pruitt* v. *Alaska Assurance Co., supra,* the Supreme Court of Washington held that an insurer's denial of a claim based upon a "reasonable and valid ground" does not give rise to

a claim under the Washington Consumer Protection Act. *Phil Schroeder, Inc.* v. *Royal Globe Insurance Co.*, 99 Wn.2d at 74.

The insured filed a motion for reconsideration in *Schroeder* which was granted, but prior to reargument, the parties settled their dispute and filed a stipulation requesting that the appeal be dismissed. Pursuant to the settlement and stipulation, the Supreme Court of Washington modified its earlier opinion, deleting the portion of the opinion addressing the Washington Consumer Protection Act claim. *Phil Schroeder, Inc.* v. *Royal Globe Insurance Co.*, 101 Wn.2d 830, 831, 683 P.2d 186 (1984).

Federal courts are bound in diversity cases to follow state rules of decisions in matters which are substantive rather than procedural, or where the matter is outcome determinative. *Guaranty Trust Co. of New York* v. *York*, 326 U.S. 99, 65 S. Ct. 1464 (1945). An intermediate state court is a datum for ascertaining state law which is not to be disregarded by federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *See C.I.R.* v. *Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 1782 (1967), citing *King* v. *Order of United Commercial Travelers*, 333 U.S. 154, 160, 161, 68 S. Ct. 488, 492, 92 L.Ed. 608 (1948).

Even were it to be assumed that the opinion in *Phil Schroeder, Inc.* v. *Royal Globe Ins., supra*, could not serve as binding authority for the decision of the federal courts, the opinion is indicative of the manner in which the Supreme Court of Washington would rule if presented with the question of an insurer's

liability under the Washington Consumer Protection Act for the denial of a claim based upon a debatable question of coverage.[1] Furthermore, the United States Court of Appeals for the Ninth Circuit properly followed the law as set down in *Miller* v. *Indiana Ins. Co., supra* and *Pruitt* v. *Alaska Pacific Assurance Co., supra* in resolving the instant suit. Petitioner's argument with respect to the Ninth Circuit's citation of *Phil Schroeder, Inc.* v. *Royal Globe Ins. Co.*, fails to support a conclusion that the decision of the Ninth Circuit decided a federal question in a way in conflict with a state court of last resort. Supreme Court Rule 17.1.(a). Accordingly, respondent MONY respectfully submits that the petition for writ of certiorari should be denied.

C. The District Court and Ninth Circuit's Denial of Petitioner's Motion for Certification to the Supreme Court of Washington Rested in the Sound Discretion of the Federal Courts, and Does Not So Depart From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

This Court has previously determined that a federal court certification of a local law question to a state supreme court rests within the sound discretion of the federal court. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741, 1744, 40 L.Ed.2d 215

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[1] Justice Pearson, in an opinion concurring in part and dissenting in part from the Supreme Court of Washington majority holding in *Federated American Ins. Co.* v. *Strong*, 102 Wn.2d 665 (1984), stated that a denial of benefits must be "frivolous and unfounded", citing *Miller* v. *Indiana Ins. Cos., supra*, to support a finding of bad faith under the Washington Consumer Protection Act.

(1974). As was the case before the Ninth Circuit, the instant petition presents no compelling reason to use the certification procedure set out by RCW 2.60.020.

Accordingly, petitioner's concern over the Ninth Circuit's denial of her motion for certification does not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Supreme Court Rule 17.1.(a). On this basis, the petition for writ of certiorari should be denied.

D. The Decision of the Court of Appeals of the State of Washington on Resident Defendants' Dismissal Pursuant to Washington Civil Rule 12(b)(6) does not Bar the Federal Courts from Adjudication here.

This petition for writ of certiorari presents petitioner's initial assertion that the federal courts were precluded from reaching a determination of this cause by the doctrine of collateral estoppel. *See* Petition for Writ, at pages 13 and 14. Petitioner cites the decision of the Court of Appeals of the State of Washington in *Gould* v. *Mutual Life Insurance Company of New York*, 863 P.2d 207, 37 Wn.App. 756 (1984) as the prior decision she seeks to assert as a bar. This argument is without merit.

The issue before the Court of Appeals of the State of Washington was whether petitioner's state court complaint against resident defendants Israel and Bailey stated a cause of action under Washington law. The Court of Appeals determined that, accepting the allegations of the Complaint as true, resident defendants Israel and Bailey acted as de facto corporate officers and in that capacity engaged in conduct

for which personal liability could be imposed. *See* Petitioner's Appendix C at C-5. The Court of Appeals accordingly determined that the Complaint did state a cause of action under Washington law and remanded the case to the state trial court for further proceedings.

The issue before the United States Court of Appeals for the Ninth Circuit was not whether petitioner's complaint stated a cause of action, but whether the record before the District Court presented any issue of material fact which would support a jury finding of liability on the part of respondent MONY. Whether the complaint stated a cause of action was not raised in the federal courts.

It is one thing to state a cause of action, and another to prove it. Although the Court of Appeals for the State of Washington determined that the state court complaint stated a cause of action, the District Court and the Ninth Circuit determined that petitioner was unable to put forward any evidence which would support her claim against respondent MONY. Accordingly, the decision of the Court of Appeals of the State of Washington in *Gould* v. *Mutual Life Insurance Company of New York, supra* does not serve to bar this litigation in the federal courts.

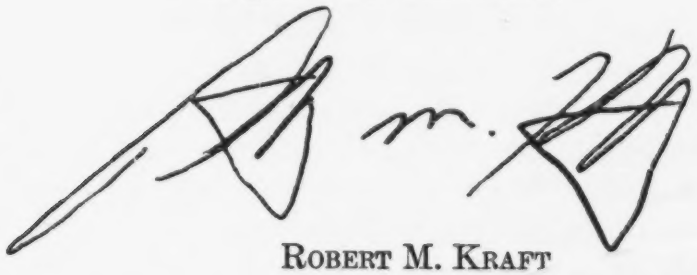
Respondent MONY respectfully submits that petitioner's argument regarding the doctrine of collateral estoppel does not meet any of the considerations governing review on certiorari as set forth in Supreme Court Rule 17, and that the petition for writ of certiorari should be denied.

IV.

CONCLUSION

The instant petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit fails to present any special and important reasons, as set forth in Supreme Court Rule 17, warranting review by this Court. On the basis of the foregoing, respondent Mutual Life Insurance Company of New York respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,



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APPENDIX

APPENDIX 1.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C82-230R

HARRIET M. GOULD, an unremarried widow,
Plaintiff,

vs.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, ROBERT ISRAEL and JANE DOE ISRAEL, his wife, C. WILLIAM BAILEY and JANE DOE BAILEY, his wife,

Defendants.

STATEMENT OF REASONS IN SUPPORT OF MOTION FOR REMAND AND CITATIONS OF AUTHORITY UPON WHICH MOVANT RELIES

PLAINTIFF'S Complaint and First Amended Complaint designates Robert L. Israel and Jane Doe Israel, his wife, and C. William Bailey and Jane Doe Bailey, his wife, as parties defendant in addition to Mutual Life Insurance Company of New York. The plaintiff's complaint alleges that the Israels and the Baileys reside in King County, Washington. See paragraphs II and III of plaintiff's First Amended Complaint. In paragraph I of both plaintiff's Complaint and First Amended Complaint, plaintiff alleges that she is a resident of King County, State of Washington.

Defendant Mutual Life Insurance Company of New York has not presented any affidavit or other evidence that there is any diversity of citizenship between plaintiff and the Israels and the Baileys.

The petitioner, Mutual Life Insurance Company of New York has furnished the court with a copy of "Order and Judgment of Dismissal of Defendants Israel and Bailey with Prejudice". That order fails to comply with Superior Court Rule 54(b) in that said order does not make an express determination that there is no just reason for delay, nor does the order expressly direct the entry of judgment. Without such determination and direction the order is subject to revision at any time before the entry of judgment adjudicating all claims and rights and liabilities of the parties.

Without such adjudication and determination in the order, plaintiff has no right to appeal to the Court of Appeals. Rules of Appellate Procedure for the State of Washington provide under Rule 2.2(d) that in the absence of the finding and adjudication required in Superior Court Rule 54(b) the judgment is not final and plaintiff has no right to appeal.

In *Doerflinger vs. New York Life Insurance Company*, 88 Wn2d 878, 567 P.2d 230 (1977), the Supreme Court of the State of Washington reviewed the rule, and reiterated the doctrine forbidding piecemeal appeals.

Under the record as submitted by the petitioner, diversity of citizenship does not exist between plaintiff and all of the defendants, and as a result this court coes not have original jurisdiction as defined

under 28 U.S.C. 1332, and there is no federal question presented pursuant to 28 U.S.C. 1331.

Under the allegations of plaintiff's complaint all defendants are jointly and severally liable to plaintiff for her claim for relief.

RESPECTFULLY submitted,

DATED this 10th day of March, 1982.

/s/ Vaughn E. Evans
VAUGHN E. EVANS, Attorney for Plaintiff

APPENDIX 2.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C82-230R

HARRIET M. GOULD, an unremarried widow,
Plaintiff,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, ROBERT ISRAEL and JANE DOE ISRAEL, his wife, C. WILLIAM BAILEY and JANE DOE BAILEY, his wife,

Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR REMAND

[Filed in the United States District Court, Western District of Washington, Mar 25, 1982, Bruce Rifkin, Clerk, by /s/E T, Deputy]

THIS MATTER comes before the court on a motion by plaintiff to remand this action to the Superior Court of the State of Washington in and for the County of King. The court, having reviewed the motion, memoranda of parties, affidavits, and other files and records pertinent hereto, hereby finds and rules as follows:

Defendant Mutual Life Insurance Company of New York (hereinafter "defendant") has removed this ac-

tion to federal court on the grounds that diversity of citizenship exists. Defendant's removal is based on an order and judgment of dismissal of defendants Israel and Bailey with prejudice entered by the Superior Court in and for the County of King, which order dismisses with prejudice all of the defendants in this action save Mutual Life Insurance Company of New York. Defendant filed its petition for removal within thirty days of that order. There is no question that the petition for removal and bond in support thereof was timely and properly filed. Plaintiff's sole grounds for remand is that the order of judgment and dismissal of defendants in the state action did not make an express determination that there was no just reason for delay and did not expressly direct the entry of judgment and that therefore the order was not final in conformity with Superior Court Rule 54(b).

Since the date of the entry of the order, the Superior Court has entered a further order and final judgment of dismissal of defendant Israel and Bailey with prejudice. The further order sets forth with particularity all factors necessary to render it a final judgment pursuant to Superior Court Rule 54(b). Since this further order resolves any question about whether the original order was final or not, the court finds that plaintiff's motion to remand is moot and should be denied.

IT IS NOW, THEREFORE, ORDERED plaintiff's motion for remand is hereby DENIED.

The clerk of the court is directed to send uncertified copies of this order to counsel of record.

DATED at Seattle, Washington this 24th day of March 1982.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX 3.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. C82-230R

HARRIET M. GOULD,

Plaintiff,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant.

ORDER DENYING PLAINTIFF'S MOTIONS FOR RELIEF FROM JUDGMENT AND CERTIFICATION

[Filed in the United States District Court, Western District of Washington, Apr 18, 1983, Bruce Rifkin, Clerk, By —— Deputy]

ON MARCH 1, 1983 this court entered an order denying plaintiff's motion for summary judgment and granting defendant's motion for summary judgment. Judgment was entered dismissing the action March 2, 1983. Plaintiff now moves for relief from judgment pursuant to Fed. R. Civ. P. 59 and 60 and for certification of state law issues to the Washington Supreme Court.

Plaintiff argues that the court's order holding plaintiff's Consumer Protection Act claim insufficient as a matter of law is riddled with errors. Plaintiff protests the court's use of a case not cited by the parties, claiming a deprivation of due process of law thereby. Plaintiff disputes the court's interpretation of Washington

consumer protection law and the complaint, attempting to recharacterize her claim. Plaintiff requests oral argument of unlimited duration and the opportunity to present yet another brief of excessive length.

The motions are without merit. This Court's interpretation of applicable law was confirmed by the Washington Supreme Court in *Phil Schroeder, Inc. v. Royal Globe Insurance Co.*, 99 Wn. 2d 65, 74 (1983). There, the insurer's refusal to pay under a policy was based on its erroneous interpretation of policy language. Since the interpretation was debatable under prior law, however, the court refused to allow liability against the insurer under the Consumer Protection Act. Similarly, although defendant's theory of this case was ultimately not accepted by the jury, it was supported by evidence capable of sustaining a jury verdict. The Consumer Protection Act affords no remedy under these circumstances.

Plaintiff's motions for relief from judgment and for certification to the Washington Supreme Court are DENIED.

The Clerk of the Court is directed to forward copies of this Order to counsel of record.

DATED at Seattle, Washington this 15th day of April, 1983.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

Office - Supreme Court, U.S.
FILED
MAR 21 1985
ALEXANDER L. STEVAS
CLERK

(3)

No. 84-1330

In The

Supreme Court of the United States

October Term, 1984

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Respondent,

v.

ROBERT L. ISRAEL, et ux. and
C. WILLIAM BAILEY, et ux.

Defendants.

AMICUS IN SUPPORT OF CERTIORARI

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TABLE OF AUTHORITIES

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No. 84-1330

In The
Supreme Court of the United States

October Term, 1984

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Respondent,

v.

ROBERT L. ISRAEL, et ux. and
C. WILLIAM BAILEY, et ux.

Defendants.

AMICUS IN SUPPORT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Washington Legislature has enunciated a strong state interest in good faith fair dealings by insurance companies. That state interest is reflected not only by the state Insurance Code, Title 48 Revised Code of Washington but also by the state Consumer Protection Act, chapter 19.86 Revised Code of Washington, which is applicable to the payment of insurance claims. Further, the Attorney General of the State of Washington, who here appears as an amicus, is specifically authorized by state law to enforce the Consumer Protection Act.

In furtherance of that state interest, the Attorney General, as amicus, here supports the petition for certiorari.

SPECIFIC PROCEEDING

The petitioner Gould brought suit in state court against two individuals and the Mutual Life Insurance Company of New York for damages as a result of the refusal of the company to pay life insurance proceeds upon the death of her husband. Subsequently, the state trial court dismissed the two individuals which dismissal was thereafter reversed by the Washington State Court of Appeals.

During the interim, while the dismissal was pending in the state appellate court, the federal district court assumed jurisdiction and dismissed the petitioner's action against Mutual Life, which order has been affirmed by the Ninth Circuit.

REASON FOR SUPPORTING CERTIORARI

The amicus supports the petition for certiorari for one overriding reason which is here reflected by two specific issues. The overriding concern is that state courts should have the opportunity to resolve matters of state law. The two specific issues in the instant proceeding are (1) the district court improperly assumed jurisdiction on the basis of diversity, and (2) the federal circuit court misstated state law by relying upon Schroeder v. Royal Globe Insurance Co., 99 Wn.2d 65, 659 P.2d 509 (1983), modified by the withdrawal of Part III, 101 Wn.2d 830, 683 P.2d 186 (1984).

The amicus is very sensitive to Schroeder, supra, because we participated in the request for a modification or removal of Part III of the Schroeder

opinion on the basis that that portion of the opinion did not reflect an accurate statement of state law.

ARGUMENT

The two concerns expressed above by the amicus are intertwined in the current proceedings. If the federal court had not improperly assumed jurisdiction, we would not now be faced with a reported decision of the Ninth Circuit which mistakenly cites the Schroeder case as reflecting Washington state law respecting the standard by which an insurer's liability is to be examined.

JURISDICTIONAL ISSUE

The decisions of this court[1] as

1 Whitcomb v. Smithson, 175 U.S. 635, 637, 20 S.Ct. 248, 44 L.Ed. 303; Kansas City Suburban Belt Ry. Co. v. Herman, 187 U.S. 63, 23 S.Ct. 24, 47 L.Ed. 76; Alabama Great Southern Ry. Co. v. Thompson, 200 U.S. 206, 26 S.Ct. 161, 50 L.Ed. 441; Lathrop v. Interior

well as the decisions of lower federal courts, including the Ninth Circuit,[2] consistently follow the rule that involuntary dismissal of a non-diverse defendant does not create federal jurisdiction, and that the joinder of non-diverse defendants in plaintiff's complaint precluded removal to the federal court.[3] Although 28 U.S.C. § 1447 requires the federal court to remand to the state court when it finds that a case has been improvidently removed, the federal courts here have ignored that

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Coustr. & Imp. Co., 215 U.S. 246, 30 S.Ct. 76, 54 L.Ed. 177; American Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 35 S.Ct. 355, 59 L.Ed. 594; Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 713.

2 Self v. General Motors Corp., 588 F.2d 655 (9th Cir. 1978).

3 Moore, Federal Practice, Vol. 1A, § 0.168[3-5] pages 597-598 (1983 ed.)

requirement.

THE SCHROEDER DECISION

The Attorney General of the State of Washington appeared as an amicus in support of a motion for reconsideration of the Consumer Protection Act issue (Part III) of Schroeder v. Royal Globe Insurance Co., 99 Wn.2d 65, 659 P.2d 509 (1983), on the basis that that portion of the opinion misstated the state law on that issue. The Supreme Court subsequently (Schroeder, 101 Wn.2d 830, 683 P.2d 186 (1984)) withdrew that portion of its opinion which dealt with the Consumer Protection Act. This removed the earlier statements from the appellate record and destroyed any precedental value of the same. We are therefore concerned that the Ninth Circuit Court of Appeals in the instant

proceeding by its references and reliance upon the withdrawn portion of Schroeder, supra, gives the impression that the withdrawn portion of the Schroeder decision, to which we objected as an amicus, nevertheless has precedental value. We submit that the enunciation of state law on this issue should be made by the state court rather than by a federal court improperly exercising jurisdiction.

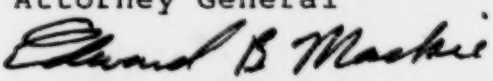
CONCLUSION

It is important to the administration of state law that federal courts recognize jurisdictional limitations and deny removal, or if improvidently removed, remand actions to the state court where the complaint shows on its face that there is a lack of diversity between the plaintiffs and all defendants. The application of that

principle to the instant case would result in a reversal of the federal court actions based on a lack of jurisdiction. Such a reversal would vacate the references to the misstated principles of state law made in the stricken portion of the Schroeder decision, supra.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General



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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY

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Defendants

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR SUMMARY DISPOSITION PURSUANT TO RULE 23

Petitioner moves for Summary Disposition pursuant to Rule 23, adjudicating:

1. There is no federal jurisdiction.

2. Opinion of Ninth Circuit has no precedential value, and

remanding to the United States District Court with instructions to remand to the State Court.

BASIS FOR MOTION

Respondent has not cited any authority for removal from the State court when the requisite element of diversity of citizenship does not appear from the complaint. A true copy of the complaint is in Appendix A hereto.

AUTHORITIES

This Court has repeatedly decreed that diversity of citizenship to support federal jurisdiction must be determined from the complaint, and that involuntary dismissal of non-diverse defendants does not create federal jurisdiction.[1] This rule has been universally followed.[2]

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[1] *Whitcomb* v. *Smithson*, 175 U. S. 635, 637, 20 S.Ct 248, 44 L. Ed. 303: *Kansas CIty Suburban Belt Ry.Co.* v. *Herman*, 187 U. S. 63 at 70, 23 S.Ct. 24, 47 L. Ed. 76: *Alabama Great Southern Ry.* v. *Thompson*, 200 U. S. 206, 26 S. Ct. 161,50 L. Ed. 441; *Lathrop* v. *Inter.Const. & Imp. Co.* 215 U. S. 246 at 251; 30 S. Ct. 76, 54 L. Ed. 177: *American Car and Foundry Co.* v. *Kettelhake*, 236 U. S. 311, 35 S. Ct. 355, 59 L. Ed. 594: *Great Northern Ry. Co.* v. *Alexander* 246 U. S. 276, 38 S. Ct. 237, 62 L. Ed. 713.

[2] *DeBry* v. *Transamerica Corp.* (CA10th-1979) 601 D.2d 480 at 488 *Self* v. *General Motors Corp.* (CA9th-1978) 588 F.2d 655 at 658, *Winters Government Securities* v. *Nafi Emp. Credit*, (SD Fla-1978) 449 F.Supp. 239 at 241; *Saylor* v. *General Motors Corp.* (ED Ky-1976) 416 F. Supp. 1173 at 1175; *Warren Bros., Co.* v. *Community Building Corp. of Atlanta Inc.* (MD NC-1974) 386 F. Supp. 656 at 660; *Weems* v. *Louis Dreyfus Corp.* (CA5th-1967) 580 F.2d 545 at 547; *Ennis* v. *Queens Ins. Co of America* (WD Tenn-1973) 364 F. Supp. 964 at 966; *Continental Oil Co.* v. *PPG Industries, Inc.* (SD Tex-1973) 355 F. Supp 1183 at 1185; *Bd of Commissioners of Dade County* v. *Blount Bros. Corp.* (SD Fla-1972) 398 F.Supp. 177 at 178; *Johnson* v. *American Mut. Ins. Co.* (WD Mo 1971) 335 F. Supp. 390 at 393: *Hum* v. *Missouri Pacific R.R.* (ED Ark-1968) 292 F. Supp. 65; *Lauf* v. *Nelson* (D Mont-1956) 246 F.Supp. 307 at 311; *Squibb-Mathieson International Corp.* v. *St. Paul Mercury Ins. Co* (SD NY-1965) 238 F. Supp. 598 at 599; *Strandholm* v. *General Constr. Co.* (D Ore 1963) 222 F. Supp. 12 at 13; *Potter* v. *Carvel Stores of New York Inc.* (D MD-1962) 203 F.Supp. 462 at 467, affirmed (CA 4th-1963) 314 F.2d 45: *Robinson* v. *LaChance* (ED NC 1962) 209 F. Supp. 845; *Wisseman* v. *LaChance* (ED NC-1962) 209 F. Supp. 807 at 810; *Stone* v. *Foster* (WD Ark-1958) 163 F. Supp. 298 at 305; *Putterman* v. *Daveler* (D Del-1958) 169 F.Supp. 125.

CONCLUSION

Respondent, not having cited a single authority contrary to the mandates of this Court that diversity of citizenship must appear from the complaint, and that involuntary dismissal of non-diverse citizens does not create federal jurisdiction, and the petitioner having been unable to find any authority contrary to the mandates of this Court, further briefing appears unnecessary.

Respondent urged waiver of jurisdictional issue in the Ninth Circuit and by innuendo, makes the same argument here.

North American Transport and Trading Co. v. *Morrison*, 178 U.S. 262, 44 L. Ed.1061, 20 S.Ct 869, disposes of the waiver theory. There, plaintiff brought an action in the Superior Court for King County, Washington — by coincidence the same court in which plaintiff here instituted her action. Defendant removed, over plaintiff's objection. Judgment was rendered against defendant. Defendant moved for remand to the State Court, which District Court denied. On appeal this Court directed the District Court to remand with costs to be taxed against defendant.

If judgment had been rendered against MONY in this action, MONY could have successfully obtained remand to the State Court.

Both the lower courts have failed in their duty to *sua sponte* remand as required by *McNutt* v. *General Motors Accept. Corp.*, 80 L.Ed. 1135, 298 U.S. 178; *McNutt* v. *McHenry Chevrolet Co.*, 80 L.Ed. 1141, 298 U.S. 190. The only recourse left to petitioner to correct the dereliction of the lower courts is to appeal to this Court.

ARGUMENT

Members of this Court have publicly deplored its excessive workload. Tolerating lower courts' arrogant indifference to limitations of their jurisdiction, both statutory and by decree of this Court, is not likely to abate the problem.

Respectfully submitted,

VAUGHN E. EVANS
Attorney for Petitioner

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

HARRIET M. GOULD,
Plaintiff,
v.
MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
ROBERT L. ISRAEL and JANE DOE ISRAEL, his wife,
C. WILLIAM BAILEY and JANE DOE BAILEY, his wife,
Defendants.

No. 81-2-18553-3

FIRST AMENDED COMPLAINT

COMES NOW the plaintiff and for first amendment to her complaint against defendants alleges:

I.

That plaintiff is a resident of King County, State of Washington, and is the widow of Vick Gould; that plaintiff was the sole beneficiary on an accidental death insurance policy issued on the life of Vick Gould by defendant Mutual Life Insurance Company of New York.

II.

That Robert L. Israel and Linda Israel are husband and wife, and as such constitute a marital community under the laws of the State of Washington; that all acts and conduct alleged herein by Robert L. Israel were in the course of earning money for the benefit of said community; that Robert L. Israel is an attorney at law practicing in the City of Seattle and residing in King County, Washington.

III.

That C. William Bailey and Laura Jane Bailey are husband and wife and as such constitute a marital community under the laws of the State of Washington; that all acts and conduct alleged herein by C. William Bailey were in the course of earning money for the benefit of said community; that C. William Bailey is an attorney at law practicing in the City of Seattle and residing in King County, Washington.

IV.

Mutual Life Insurance Company of New York is a foreign corporation doing business in King County, State of Washington; that said defendant issued an accidental death insurance policy upon the life of Vick Gould; that said policy provided for life insurance benefits to his designated beneficiary, plaintiff, Harriet M. Gould, in the sum of Twenty Five Thousand Dollars ($25,000.00) in the event of accidental death; that all provisions of said policy excluded coverage in the event the death of the insured was suicide.

V.

That on May 27, 1976, Vick Gould was found shot to death in Robinswood Park in the City of Bellevue; that plaintiff made proper claim against defendant Mutual Life Insurance Company of New York for the death benefits on policy issued by said defendant.

VI.

That without any evidence to support a defense of suicide, defendant Mutual Life Insurance Company of New York and its attorneys and agents, Robert L. Israel and C. William Bailey, made the decision to refuse to pay the death benefits due Harriet M. Gould, assigning as the sole reason for such denial that Vick Gould took his own life; that the said defendants, Mutual Life Insurance Company of New York, Robert L. Israel and C. William Bailey, acting in consort and with common design, continued to refuse to pay the proceeds of said policy to plaintiff, which necessitated plaintiff instituting a lawsuit against Mutual Life Insurance Company of New York; that said lawsuit resulted in a judgment against Mutual Life Insurance Company of New York and in favor

of plaintiff, Harriet M. Gould; that the said defendants, acting in consort and with common design, appealed said judgment to the Supreme Court of the State of Washington; that the Supreme Court of the State of Washington affirmed the judgment of the Superior Court of the State of Washington; that in further effort to delay and deny plaintiff's right to receive the proceeds of her insurance policy, defendants, acting in consort and common design, petitioned the Supreme Court of the State of Washington for reconsideration; that the Supreme Court denied reconsideration on September 9, 1981; that the said judgment was not paid until September 29, 1981.

VII.

That the acts and conduct of defendants Robert L. Israel and C. William Bailey were not limited to services of attorneys, but included participation in and managing the wrongful and bad faith conduct as agents of Mutual Life Insurance Company of New York, including, but not limited to, making command decisions to wrongfully and in bad faith deny plaintiff's claim, initiating and approving conduct designed solely to harrass and humuliate plaintiff and cause her mental distress, with intent to intimidate plaintiff into abandoning her claim or settling for a mere fraction of the benefits to which plaintiff was entitled and for which plaintiff had paid premiums.

VIII.

That the conduct of defendants and each of them constitutes bad faith, unfair and deceptive acts and practices in the conduct of their trade and commerce in violation of the consumers protection act, RCW 19.86; that plaintiff is entitled to punitive damages and attorneys fees as provided by the act.

IX.

That the damages suffered by plaintiff will be proven at time of trial; that pursuant to RCW 4.28.360, plaintiff will set forth her damages upon the request of the defendants.

WHEREFORE plaintiff prays that she have judgment against defendants and each of them for a sum to be proved at trial, together with the costs and disbursements herein incurred, and a reasonable attorneys fee and punitive damages as provided by RCW 19.68.

DATED this 26th day of January, 1982.

VAUGHN E. EVANS
Attorney for Plaintiff